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In The
Supreme Court of the United States
October Term, 1983

NAVAJO MEDICINEMEN'S ASSOCIATION, *et al.*,
Petitioners,
vs.

JOHN R. BLOCK, Secretary of Agriculture, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

- A. Respondents evade the crucial question: How can the destruction of a sacred place be held not to constitute a burden on religion?

Respondents have completely avoided the central issue raised by this case. The question is not whether petitioners' claim should be measured by the two-step Free Exercise analysis employed by this Court in *Thomas v. Re-*

view Board of the Indiana Employment Security Division, 450 U. S. 707 (1981) and *Sherbert v. Verner*, 374 U. S. 398 (1963). Petitioners are in fact *seeking* the application of that test. Rather, the issue is what legal standard must be used to determine the existence of a burden on the free exercise of religion under that test. The respondents' bald assertion that petitioners "failed to carry their burden of proof on the first prong of the analysis," (Brief for the Federal Respondents in Opposition ("Op.") at 9), completely begs this question.

The Court of Appeals held that the operation of a ski resort on the San Francisco Peaks created no legally cognizable burden on petitioners' religions. It did so after acknowledging that, as a factual matter, the Peaks are "indispensable" to the practice of the petitioners' religions. (Pet. App. 17.) Respondents' assertions notwithstanding, the crux of the Court of Appeals' decision was clearly the legal, rather than factual, determination that any infringement on petitioners' religions, short of one rendering physically impossible the conduct of a religious ceremony *anywhere*, did not constitute a burden cognizable under the First Amendment. As a matter of *fact*, the Forest Service plans entail the destruction of a sacred place; the forced abandonment of that place for ceremonies; the visual, aural, environmental—and theological—degradation of the rest of a mountain whose religious power derives from its natural condition.¹ As a matter

¹It was stipulated that: "The whole of the San Francisco Peaks is used by the Navajo Plaintiffs for religious purposes." Joint Stipulations of Material Fact, No. 41 (Joint Appendix in the Court of Appeals ("Jt. App.") at 183). It was also stipulated

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of law, the Court of Appeals held that none of these effects created a burden. It is that legal conclusion, which cannot be reconciled with the indirect burden standards previously used by this court, for which these petitioners seek review.

Having initially argued for application of the two-part test, respondents then make a second, inconsistent argument. They argue for the startling rule that "normal management activity pursuant to congressional authorization *cannot* amount to an impermissible burden on the Indians' First Amendment right to the free exercise of their religion." (Emphasis added, Opp. at 11.) It is implied that this principle derives from First Amendment law written by this Court. In fact, this "normal management" test of what constitutes a "burden" is wholly inconsistent with established First Amendment principles. Normal management of a public school system was held to constitute a burden on Free Exercise in *Wisconsin v. Yoder*, 406 U. S. 205 (1972). Normal management of an unemployment compensation program was held to constitute a burden on religious freedom in both *Sherbert v. Verner*, *supra*, and *Thomas v. Review Board*, *supra*. Con-

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that: "The whole of the Arizona Snow Bowl permit area, being part of the San Francisco Peaks, is considered to be sacred by the Navajo Plaintiffs," Joint Stipulations of Material Fact, No. 44 (Jt. App. 183). Petitioners' affidavits further showed that a portion of the Mountain could not simply be excised from religious practices. Certain ceremonies necessitate going to all sides of the Mountain. (Jt. App. 811, 814, 815, 861.) In the face of this, the approach of the Court of Appeals is unprecedented with respect to any religions other than those of Native Americans. The result is that a sacred place can be dismantled piece-by-piece, with no requirement whatever that the weight of countervailing interests be considered.

gress itself has specifically recognized that normal management activities have burdened Indian religions in a variety of ways and has sought, through legislation, to prevent those infringements from continuing. *American Indian Religious Freedom Act*, 42 U.S.C. §1996, and Preamble, Pub. L. 95-341.

Respondents also obscure the real issue in this case by arguing that petitioners are asking them to "dedicate the entire 75,000-acre Peaks as a religious shrine."² (Opp. 7, 8, 11.) Respondents ignore the fact that the Mountain is a religious shrine, and has been so for Native Americans since long before the United States came into being. Petitioners do not ask that the government "dedicate" the Peaks to anything. They merely ask that Respondents refrain from *destroying* them, absent some compelling reason to do so.

Nor do the petitioners seek any veto authority over government action. This Court in *Larkin v. Grendel's Den*, — U. S. —, 74 L. Ed. 2d 297 (1982), struck down a law which gave churches an independent, unreviewed veto power over the grant of liquor licenses, because that licensing decision should be made by the government, and not by a religious institution. But the Court also recognized that "churches have a valid interest in being insulated from certain kinds of commercial establishments," and that when the government made its decision, these

²It should be noted that the 75,000-acre figure is an arbitrary one. In 1974, in its San Francisco Peaks Land Use Plan, the Forest Service suggested that the Peaks covered 53,460 acres, and even that figure included outlying hills and adjoining lower areas not relevant to this dispute. Unfortunately, altering the definition of the Peaks "area" does not diminish the adverse effects of building a ski resort close to the summit.

religious interests would be entitled to substantial weight. Petitioners have not asked herein that the management of the Peaks be taken out of government hands. They only ask that their interests be given appropriate weight. In this case their religious interests were demonstrably given a fraction of the weight of recreational interests, and the administrative decisionmakers actively supported the private developers in soliciting public support for their plan. (Jt. App. 1883-1926; 1928). It is that failure to accord any "substantial weight" to their concerns to which they object, and not the absence of a veto power.

The respondents have failed to suggest any legal justification for ignoring the very real religious burdens involved in this case.

B. The historic background provides no justification for continued infringement of petitioners' religious freedom.

Respondents rely, as did the Court of Appeals, on the fact that the "Snow Bowl has been in operation for nearly 50 years and that the Indians' religious practices and beliefs apparently have managed to co-exist with the diverse developments that have occurred there." (Opp. at 10.) Petitioners reject the implication that past infringements of their religious rights provide a legal justification not only for more of the same, but for the imposition of far greater burdens. See *Walz v. Tax Commission*, 397 U. S. 664, 678 (1970).

This statement also erroneously implies that the level of development on the Peaks since the 1930's has been somehow similar to what the Forest Service is proposing today. When skiing began on the Peaks fifty years ago,

it involved no ski lift of any kind. In terms of its effect on the Mountain, the activity was much closer to unobjectionable activities such as cross-country skiing, hiking, or similar recreational use. Such past use provides no justification for the disturbance that will result from the construction of five chair lifts, a lodge accommodating 900, and eight acres of parking, among other development.

The reliance on the fact that petitioners have managed to "co-exist" with existing development³ is unconscionable. The alternative to co-existence would have been extinction. The holdings of this Court are wholly inconsistent with the suggestion that nothing short of a threat of immediate extinction amounts to a cognizable burden. Yet this is the standard to which these Indian religions are being held.

Petitioners are members of a long-disenfranchised, impoverished group, to which the respondents owe a unique trust obligation. Yet respondents imply that Navajo and Hopi Indians—who could not even vote until 1948⁴—should be estopped from complaining of religious infringement now because they did not do so in the 1930's, a decade during which some Indian religious ceremonies were still prohibited as criminal offenses.⁵

The fact is that the United States was extremely slow to recognize Native American faiths as *bona fide* religions

³The existing natural gas, telephone, and electric transmission lines, water tanks, and unimproved roads are not at issue here. These are the very types of developments which can be justified under the "compelling state interest" test, and petitioners have raised no legal objection to them.

⁴*Harrison v. Laveen*, 67 Ariz. 337, 196 P. 2d 456 (1948).

⁵Federal Agencies Task Force, *American Indian Religious Freedom Act Report*, 6.

entitled to protection under the Constitution. Moreover, widespread poverty, illiteracy, inability to speak English, and isolation on their vast reservations made legal assistance practically unavailable to Navajo and Hopi Indians until the mid-1960's. But since that time, Navajo and Hopi religious practitioners have continually sought protection for their sacred mountain in administrative and judicial proceedings.⁶

Also unconscionable is the respondents' reliance on the fact that on a *single* occasion apiece, Navajo and Hopi practitioners used the ski lift. (Jt. App. 177.) This fact was, properly, not relied on by the Court of Appeals. But respondents seek to create from these isolated incidents the impression of some regular practice. (Opp. 10.) The affidavit of a Navajo who used the lift on that one occasion in fact reveals that on arriving at the top he "felt the mountain was being abused," "felt real bad when he tried to pray there," "put the offering down and went right back down the lift." (Pet. App. at 819.) But in any case, it is difficult to imagine respondents so much as suggesting, in another context, that the claims of an entire religious group (to whose sincerity it has stipulated) should be discounted because of the behavior of a handful of adherents on a single occasion.

⁶In 1969, an earlier Snow Bowl permittee, Summit Properties, proposed its own development of the area. The plan was contested by large numbers of Native Americans. The ultimate outcome of the dispute, after several years of well-publicized administrative and judicial proceedings, was that Summit was denied the local zoning approval its particular project required. As a result, Summit divested itself of the permit in the mid-1970's. It was acquired by Northland Recreation, Inc., which immediately proposed the expansion now at issue. Plaintiffs have been objecting to that plan ever since.

The Federal Agencies Task Force which authored the 1979 *American Indian Religious Freedom Act Report* concluded its history of the federal treatment of Indian religions thus: "With the enactment of the American Indian Religious Freedom Act, our Nation is being afforded the opportunity to correct past injustices and to begin anew with regard to the treatment of those who adhere to the tenets of traditional Native religions." The United States should not now be permitted to rely on those same past injustices as an excuse for more of the same.

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CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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